Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR

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QUESTIONS PRESENTED

1. Whether the Jicarilla Apache Tribe retained, as a fundamental attribute of its sovereignty, the power to impose a severance tax on oil and gas extracted from trust property on its reservation.

2. Whether Congress has implicitly divested the Tribe of such a power by authorizing New Mexico to impose severance taxes in respect of oil and gas extraction on the reservation, or by regulating the production and distribution of oil and gas.

3. Whether the Tribe's taxing ordinance violates the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 139-197) is reported at 617 F.2d 537. The district court's findings of fact and conclusions of law (J.A. 127-133) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1980. On April 25, 1980, a timely petition for rehearing filed by petitioners in No. 80-11 was denied (J.A. 199). By orders dated May 9 and June 12, 1980, Mr. Justice White granted petitioners in No. 80-15 extensions of time to and including July 5, 1980, within which to file their petition for a writ of certiorari (80-15 Pet. App. 1e, 1f). The petitions in No. 80-11 and No. 80-15 were filed on July 3 and July 5, 1980, respectively. Both petitions for certiorari were granted on October 6, 1980 (J.A. 203, 204). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND ORDINANCE INVOLVED

The Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398a-e, is reproduced at 80-15 Br. App. 3a-7a. The Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance is set forth at 80-15 Br. App. 13a-19a.

STATEMENT

1. The Jicarilla Apache Tribe, with an enrollment of 2,100 members, occupies a reservation in northwestern New Mexico, established by a series of Executive Orders issued between 1874 and 1912 (80-15 Br. App. 20a-24a). The entire Reservation, comprising 742,315 acres, is trust land; there are no individual allotments or non-Indian tracts. The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, and operates under a federally-approved Constitution and corporate charter. The original Con-

stitution, approved by the Secretary of the Interior on August 4, 1937, declared that the Tribe's powers included all those powers possessed in the past, in addition to those specifically conferred by Section 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U.S.C. 476. Subsequent revisions to the Tribe's Constitution in 1960 and 1968 have elaborated upon these powers. Article XI, Section 1(e) of the Constitution now states that the tribal council may, subject to approval by the Secretary of the Interior, "impose taxes and fees on non-members of the tribe doing business on the reservation" (80-15 Br. App. 12a-13a). The revised Constitution containing this provision was approved by the Secretary in 1969.

2. For a number of years, the Tribe has leased its oil and gas reserves, under statutory authority and with the approval of the Secretary, to non-Indian producers. The State of New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an *ad valorem* tax on oil and gas production equipment, all of which have been collected from petitioners' on-reservation activities under leases from the Tribe (J.A. 129, 155).

3. In July 1976, the Tribe adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands" (80-15 Br. App. 13a-18a). The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation," with the tax due at the time of severance and payable monthly by the well operator (*id.* at 14a). Oil and gas taken by the Tribe as royalty in kind is exempt from the tax (*ibid.*). The ordinance was approved by the Secretary in December 1976 (*id.* at 18a), with the first tax remittance due in June 1977.

4. In May 1977, a group of 17 independent and corporate oil and gas producers holding tribal leases (Merrion and Bayless, *et al.*, petitioners in No. 80-11), filed a com-

plaint in United States District Court for the District of New Mexico, seeking to enjoin enforcement of the Jicarilla tax. The claim was, *inter alia*, that the Tribe lacked inherent or statutory authority to tax; that the Secretary of the Interior improperly approved the tribal ordinance; that, pursuant to 25 U.S.C. 398 and 398c, the State had exclusive authority to impose a severance tax; and that the tribal tax discriminated against interstate commerce (J.A. 1-13).

In the consolidated case, Amoco Production Company and Marathon Oil Company (petitioners in No. 80-15) filed a separate complaint against the Tribe, tribal officials, the Secretary of the Interior and state officers, repeating the claims in the first complaint but including a request for a declaratory judgment that if the tribal tax were declared valid, the State tax should be declared invalid (J.A. 43-61).

After a hearing, the district court on July 6, 1977, granted a preliminary injunction enjoining the initial collection of the tribal severance tax, but requiring the lessees to place in escrow an amount estimated to cover three-months' tax liability. Mobil Oil and Oxy Petroleum Company (petitioners in No. 80-11) were subsequently granted leave to intervene, and filed a joint complaint alleging essentially the same causes of action as the Merrion and Bayless plaintiffs.

After a non-jury trial, the district court on December 29, 1977 entered judgment for the oil and gas producers permanently enjoining the Tribe and the Secretary from enforcing the tribal severance tax, which the court declared "illegal, unconstitutional, invalid and void" (J.A. 135). In separate findings of fact and conclusions of law (J.A. 127-133), the district court concluded that: (1) 25 U.S.C. 398c grants the State the exclusive right to impose a severance tax; (2) neither tribal sovereignty nor the powers enumerated in the Indian Reorganization Act give the Tribe the power to impose a severance tax on non-Indians; and (3) the tribal tax

violates the Commerce Clause of the United States Constitution because it is discriminatory and results in a multiple burden on interstate commerce (J.A. 132). The stated bases for the invalidity of the tax under the Commerce Clause were that the Tribe does not tax "similarly situated" oil and gas off the Reservation, although in the same geologic structure in New Mexico, that the tax is levied only on oil and gas transported off the Reservation, and that the combined State and tribal taxes would impermissibly increase the percentage of the interstate price of oil and gas paid in taxes (J.A. 130).

5. The court of appeals, sitting en banc, reversed (J.A. 141-165), two judges dissenting (J.A. 165, 176). As this Court subsequently held in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980), the court below ruled that the Tribe's power to impose the challenged tax was an inherent attribute of its sovereignty of which it had not been divested by any treaty or Act of Congress, including the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398c, which permitted the states to impose like taxes (J.A. 145-152, 157-161). Nor, held the court, was the Tribe's power to impose this severance tax implicitly divested by reason of any inconsistency with overriding federal interests, including those finding expression in the Commerce Clause (J.A. 146-148, 152-153, 156). Specifically, the court found that the tax is neither discriminatory nor a multiple burden offensive under the Commerce Clause (J.A. 152-156).

SUMMARY OF ARGUMENT

I

Petitioners' contention that the Jicarilla Apache Tribe lacks the inherent governmental authority to tax the extraction of oil and gas by non-Indians on the Reservation is foreclosed by the Court's decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980). There the Court held that "[t]he power to tax transactions occurring on trust lands

and significantly involving a tribe or its members is a fundamental attribute of sovereignty" that is "not implicitly divested by virtue of the Tribe['s] dependent status." Slip op. 15, 16. The consistent view of the Executive, Judicial, and Legislative Branches has been to the same effect. In the instant case, the extraction of vital and depletable resources from trust lands is without question intimately associated with the Indian land situs and significant tribal interests and therefore well within the Tribe's taxing authority under *Colville*.

Nor, contrary to petitioners' contention, has the "shared presumption" of the three branches of the federal government that tribes have authority to tax non-Indians been recognized only where a tribe may exclude the non-Indians from the reservation. The holding in *Colville*, quoted above, was not so limited, and in *Buster* v. *Wright*, 135 F. 947 (8th Cir.), appeal dismissed, 203 U.S. 599 (1905), the power to tax was recognized even where Congress had passed a statute prohibiting removal of the non-Indians. Both Congress and the Executive Branch also have recognized the importance of the tribe's ability to raise revenue for essential governmental services by taxing non-Indians doing business on the reservation, quite aside from the tribes' power to remove them.

Finally, the Jicarilla Apache Tribe's power to tax is not circumscribed merely because its reservation was established by Executive Order. The power to tax is a residuum of aboriginal independence, and it therefore does not vary depending on the manner in which a tribe's place of residence has been defined. Section 16 of the Indian Reorganization Act confirms this, for tribes occupying Executive Order reservations are considered to have the same governmental powers as those residing on reservations created by treaty or statute.

II

The Tribe's power to tax has not been divested by subsequent legislation. Petitioners are unable to cite a single reference to Indian severance taxes in connection with

the passage of the Act of March 3, 1927, which authorized the mineral leasing of lands in Executive Order reservations, or in more recent energy legislation enacted by Congress. In these circumstances, there can be no basis for concluding that the Tribe's power to "rais[e] revenues for essential government programs" (*Colville, supra*, slip op. 20) has been divested by federal law.

A. Petitioners' argument that the 1927 Act divested the Tribe of its taxing authority rests solely on the fact that Congress permitted the state to tax the severance of oil and gas on Executive Order reservations. But conceding the power of taxation to one sovereign does not ordinarily cancel the preexisting right of another government with jurisdiction over the same activity to impose a like tax. And petitioners have pointed to nothing in the background of the 1927 Act to suggest such an unusual result in this case. The 1927 Act merely extended to tribes occupying Executive Order reservations the same provisions for leasing and payment of royalties to tribes that had been enacted in 1891 and 1924 for treaty reservations. The authorization of state taxes in the 1927 Act was likewise drawn from the 1924 Act. Both, in turn, are consistent with similar provisions for imposition of state taxes in a 1919 statute permitting the leasing of "solid" minerals on treaty and Executive Order reservations and in Section 32 of the Mineral Lands Leasing Act of 1920, which governs leasing of the public domain.

It is clear that in authorizing collection of state taxes the United States did not surrender its prerogative to impose like taxes, and there is no reason to draw a different conclusion with respect to tribal taxes. The most natural explanation for the general pattern of leasing legislation is that Congress sought to provide needed revenues for those states with large tracts of tax-exempt federal land while, at the same time, eliminating a type of "tax favoritism" that federal lessees and Indian wards enjoyed under the federal instrumentality doctrine. Consistent with prior leasing statutes, the legislative his-

tory of the 1927 Act reveals a consensus from the start that states should be permitted to tax the severance of oil and gas on Executive Order Indian reservations. Accordingly, there is no basis for petitioners' contention that the Act reflects a carefully crafted compromise—under which the states would have exclusive authority to tax and the tribes would receive all royalties—that would be upset by recognizing a tribal right to tax.

B. Nor has the Tribe's power to tax been divested by the Secretary's regulation of the leasing process or by recent energy legislation. Petitioners have not suggested why, if state severance taxes are permitted, tribal taxes are inimical to the national interest. And, indeed, the National Gas Policy Act of 1977 makes express allowance for tribal as well as state severance taxes. The Secretary's regulation of the leasing process is for the Tribe's benefit, and therefore cannot be thought to have ousted the Tribe's taxing authority. In any event, the Tribe's severance tax ordinance was *approved* by the Secretary in accordance with the Indian Reorganization Act and the leasing regulations themselves.

III

A. The Tribe's severance tax is not invalid under the Commerce Clause because that Clause does not limit the regulation of commercial transactions by Indian tribes. Although *states* are barred from placing undue burdens on commerce "among the several States" or from interfering with Congress' exclusive authority to regulate commerce "with foreign Nations" and "with the Indian tribes," it is settled that constitutional restraints on the states do not apply to Indian tribes. Moreover, the text and structure of the Commerce Clause indicate that the Framers viewed tribes, like foreign nations, as sovereign entities with whom it was appropriate to enter into treaties. As a result, a tribe, like a foreign nation, cannot be thought to violate the Commerce Clause when it imposes restraints on its commercial dealings.

B. Even if the Commerce Clause restrains the Tribe's actions in some fashion, these actions are not to be judged by standards developed to ensure an "area of free trade" among the states. The background and implementation of the Indian Commerce Clause indicate that restrictive measures are appropriate in this setting. In any event, the Tribe's tax does not discriminate against oil and gas shipped off the reservation or out of New Mexico, and it does not impose a multiple burden on interstate commerce within the meaning of this Court's decisions. And even if the tax were thought defective under the Commerce Clause standing alone, Congress has sanctioned the Tribe's tax and, we assume for present purposes, the state's tax as well.

ARGUMENT

The validity of the Jicarilla Tribe's oil and gas severance tax primarily depends upon whether the Tribe, notwithstanding its "dependent status," retained the inherent power to tax and, if so, whether subsequent federal law worked a divestiture of that tribal authority. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980), slip op. 15. We consider these issues in Points I and II below. In Point III we address petitioners' contention that the tribal tax is invalid under the Commerce Clause.

I. THE JICARILLA APACHE TRIBE RETAINED, AS A FUNDAMENTAL ATTRIBUTE OF ITS SOVEREIGNTY, THE POWER TO TAX THE EXTRACTION OF NATURAL RESOURCES ON RESERVATION LAND BY NON-INDIANS

Petitioners first argue (80-11 Br. 7-26; 80-15 Br. 7-15) that, quite aside from any federal legislation bearing on the question, the Tribe lacks the inherent governmental authority to tax the extraction of oil and gas by non-Indians on the Reservation. This contention is foreclosed by the Court's reaffirmation of tribal taxing authority last Term in *Washington* v. *Confederated Tribes*

of the Colville Indian Reservation, supra. In that case, it was expressly held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty" that is "not implicitly divested by virtue of the Tribe['s] dependent status." Slip op. 15, 16.[1]

The inherent power to tax was recognized in *Colville* in respect of sales of cigarettes imported from out-of-state and sold primarily to outsiders in circumstances where it was "painfully apparent that the value marketed by the smokeshops * * * [was] not generated on the reservations by activities in which the Tribes have a significant interest." Slip op. 18. Here, in contrast, the activity taxed—extraction of vital and depletable resources on which the economic well being of the Tribe in this and future generations depends—is without question far more intimately associated with the Indian land situs and significant tribal interests. A Tribe's "interest in raising revenues for essential government programs * * * is strongest" where, as here, the value is generated on the reservation by activities involving the Tribe. Slip op. 20.

1. This view of tribal taxing authority is not of recent origin. It has been the "shared presumption" of the Legislative, Executive, and Judicial Branches since the turn of the century, and before. Compare *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Thus, officers of the Executive Branch consistently have held that Indian tribes have the inherent power to tax activities of non-

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[1] This is not to say, of course, that tribes do not have authority, as one of the " 'attributes of sovereignty over both their members *and their territory*' " (*White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 5, quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added), to tax transactions occurring on fee land within the reservation, including that belonging to non-Indians. See, *e.g.*, *Buster* v. *Wright*, 135 F. 947, 951-953 (8th Cir.), appeal dismissed, 203 U.S. 599 (1906); 23 Op. Att'y Gen. 214 (1900). There is no occasion to consider that issue here, however, because the leases involved are for the extraction of oil and gas on tribal lands.

members occurring within the reservation. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra,* slip op. 15-16, citing 23 Op. Att'y Gen. 214 (1900), and *Powers of Indian Tribes,* 55 Interior Dec. 14, 46 (1934);[2] see also F. Cohen, *Handbook on Federal Indian Law* 142 (1942). Moreover, this Court's decision in *Colville* and the Tenth Circuit's decision in the instant case (J.A. 144-152) are only the most recent examples of recognition by the Judicial Branch of a tribe's inherent power to tax non-Indians. See, *e.g., Morris* v. *Hitchcock,* 194 U.S. 384 (1904); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster* v. *Wright,* 135 F. 947 (8th Cir.), appeal dismissed, 203 U.S. 599 (1905); *Maxey* v. *Wright,* 54 S.W. 807 (C.A. Ind. Terr.), aff'd, 105 F. 1003 (8th Cir. 1900); *Crabtree* v. *Madden,* 54 F. 426, 430 (8th Cir. 1893).

Congress, too, long has recognized the inherent sovereign power of the Indian tribes to tax non-Indians. For example, in an 1879 report concerning the validity of a tax imposed by the Chickasaw Nation on non-Indians who rented land or procured employment within its territory, the Senate Committee on the Judiciary stated:

> We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; *and they undoubtedly possess the inherent right*

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[2] See also 55 Interior Dec. at 17, concluding that the powers of local self-government vested in Indian tribes include the authority "[t]o levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders."

> *to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects—a right not in any sense derived from the Government of the United States.*

S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (emphasis added). See also *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392-393 (1904).[3]

In 1934, Congress enacted the Indian Reorganization Act (ch. 576, 48 Stat. 984) which, in Section 16, provides that a tribe may elect to organize under that Act and provide in its constitution for the exercise of "all powers vested in [the] Indian tribe or tribal council by existing law." 25 U.S.C. 476. Immediately after passage of the Act, the Solicitor of Interior interpreted the quoted phrase in Section 16 to include "the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties." *Powers of Indian Tribes*, 55 Interior Dec. 14, 18 (1934). Among these powers was the inherent authority of an Indian tribe to tax non-members.

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[3] After the Attorney General opined in 1900 that the Secretary of the Interior had the authority to enforce the Chickasaw permit tax statute by removing persons violating the statute or closing their businesses, 23 Op. Att'y Gen. 214, 219, Congress made it unlawful for the Secretary to remove any person in lawful possession of any lot or parcel in any town site designated in Indian Territory. Act of May 27, 1902, ch. 888, 32 Stat. 245, 259; see *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392-393. "The only rational inference from this legislation is that Congress never had any purpose to annul the laws of the tribes prescribing their permit taxes, or to prevent their enforcement by the passage of the deportation act of 1902, and that that act had no such effect." *Buster* v. *Wright*, *supra*, 135 F. at 958. See also *id.* at 954 (congressional approval of agreement with Creek Nation reflects an intent not to extinguish Nation's power to impose permit taxes on mercantile business).

Id. at 46-48.[4] Any other result would have been surprising in an Act passed for the purpose of "fostering tribal self-government" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra*, slip op. 18), because for Indian tribes, no less than states, "[t]he power of taxation is indispensable to their existence" as independent entities. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824). The development of a viable tribal government could not realistically have been expected to depend on taxes imposed only on Indians, in view of the poverty that has long persisted on Indian reservations. Accordingly, even assuming that the regulatory powers of Indian tribes were expected to be directed primarily toward tribal members,[5] it would be entirely consistent with this expectation for a tribe to rely in some measure on taxes imposed on non-members engaged in activities on the reservation to support essential governmental services.[6]

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[4] Indeed, as the court of appeals observed (J.A. 151), Congress was apprised of the holding in *Buster* v. *Wright, supra*, sustaining the tribal power to tax, in hearings conducted prior to passage of the Act. See *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. 269-270 (1934).

[5] But see *Colville, supra*, slip op. 15: "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians."

[6] As the Court noted in *Colville* (slip op. 16), the consensus among the branches of the federal government respecting the power to tax non-Indians on the reservation is in marked contrast to the "shared presumption" of the three branches discussed in *Oliphant* v. *Suquamish Indian Tribe, supra*, that Indian tribes do not have criminal jurisdiction over non-Indians. This is apparent from a review of the early authorities. Although Judge Parker had held that a tribal court did not have criminal jurisdiction over non-Indians in the Indian Territory (see 435 U.S. at 199-201, citing *Ex parte Kenyon*, 14 F. Cas. 353 (No. 7720) (W.D. Ark. 1878)), and the Attorney General had concluded that the Choctaws did not have criminal jurisdiction over non-Indians (435 U.S. at 198-

2. Petitioners argue, however (80-11 Br. 22-26; 80-15 Br. 8-10), that a tribe's power to tax non-Indians rests solely upon and is co-extensive with its power to exclude outsiders from its reservation. The leasing of tribal lands for oil and gas production, they say, permits their entry, terminates the Tribe's power to exclude them, and thereby abrogates whatever power the Tribe may have had to tax their activities.[7] This is a startling proposition—and one

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199, citing 2 Op. Att'y Gen. 693 (1934), and 7 Op. Att'y Gen. 174 (1855)), the early authorities discussed in the text that recognized the tribal power to tax non-Indians also principally involved measures adopted in the Indian Territory. Significantly, these measures were to be enforced with the assistance of the federal government, by expulsion of the offending non-Indian or closing his business, not through criminal sanctions imposed by the tribe. See, *e.g.*, *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 391-393.

[7] Of course, the Tribe *did* have the power to prevent petitioners from entering onto the reservation in the first place: Under 25 U.S.C. 396b, 398, and 476, the lands could be leased to petitioners only with the Tribe's consent. Under petitioners' theory that a tax must be a condition of entry, the Tribe presumably could have imposed a tax on their operations as long as that tax became effective before the lease was signed. Their argument therefore must be that when the Tribe consented to the leases here in issue, it thereby waived its right to tax the output of petitioners' operations. This waiver would, it seems, be effective for the duration of the leases, which in this case extend for as long as oil and gas are produced in "paying quantities" (J.A. 23)—in other words, until the resource is depleted. It defies reason to suggest that the Tribe, in consenting to a lease, implicitly gave up for all time the sovereign power to tax that it concededly had before the lease was entered into.

This Court has held that a license or franchise issued by a governmental body that provides for the payment of fees or royalties does not prevent the later imposition of a tax on the same operations unless the right to tax "has been specifically surrendered in terms which admit of no other reasonable interpretation." *City of St. Louis* v. *United Rys.*, 210 U.S. 266, 280 (1908). There is not in the leases or governing regulations in this case the requisite "clear and unmistakable" surrender of the taxing power. *New Orleans City & Lake R.R.* v. *City of New Orleans*, 143 U.S. 192, 195 (1892). See also *New York Rapid Transit Corp.* v. *City of*

that stands accepted principles of equitable taxation on their head.

Unlike the non-Indians attracted onto a reservation to purchase cigarettes in *Colville* (slip op. 17), petitioners avail themselves of the " 'substantial privilege of carrying on business' " on the reservation, *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 437 (1980), quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940). And unlike the non-Indians in *Colville*, petitioners presumably benefit substantially in their occupation of reservation lands from the provision of police and fire protection and other governmental services, as well as "the advantages of a civilized society" on the reservation the severance taxes are designed to support, *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, No. 79-509 (June 10, 1980), slip op. 19, quoting *Japan Line, Ltd* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979). But despite these significant benefits and the fact that petitioners' activities indisputably affect tribal interests in the extraction of a depletable resource, petitioners contend that the Tribe does not have the power to tax them. Under petitioners' theory, the incidence of any taxes the Tribe extends to non-Indians must be only on those, like the transient cigarette purchasers in *Colville*, who reside elsewhere and cannot assert a legal right to remain on the reservation. This proposition is, of course, flatly inconsistent with the Court's holding in *Colville*, discussed above, that a

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New York, 303 U.S. 573, 590-593 (1938). Governing regulations do provide that no regulations made after approval of a lease shall operate to affect the terms of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease (25 C.F.R. 171.28), and the leases themselves in this case contain a similar clause (J.A. 27). But petitioners conceded in the court of appeals (J.A. 161) that such a provision concerning contractual royalties and rentals does not bar the exercise of the sovereign power to tax. *Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942), relied upon by petitioners (80-11 Br. 26 n.34; 80-15 Br. 10 n.7), involved a special assessment to be used in furtherance of the objectives of the contract, an assessment that was conceded not to be a tax (315 U.S. at 616).

tribe's interest in raising revenues essential for governmental programs is strongest when the revenues "are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services" (slip op. 20).[8]

Not surprisingly, the "shared presumption" of the three branches of the federal government that tribes have the authority to tax non-Indians has not been dependent on the tribes' power to exclude. The Court's holding in *Colville* that such power is a "fundamental attribute of sovereignty" was not dependent upon a power to bar the non-Indians paying the tax from entering the reservation.[9] This conclusion is evidenced by the Court's citation (slip op. 16) to *Buster* v. *Wright*, *supra*, in which the

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[8] Moreover, absent an express authorization of state taxation such as that petitioners say is applicable here (see pages 22-23, note 16, *infra*), the activities of many Indian traders and other non-Indians with business establishments on a reservation might be exempt from state taxation as well. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, No. 78-1604 (June 27, 1980). The effect of petitioners' argument conditioning the power to tax on the power to exclude might be to exempt many non-Indian businesses on a reservation from state *and* tribal taxation—a windfall having no sound basis in law or policy.

[9] Nor was the observation that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest" (*Colville*, *supra*, slip op. 15). Petitioners in No. 80-15 (Br. 8) rely on the Court's statement that federal courts "have acknowledged the tribal power to tax non-Indians, *entering* the reservation to engage in economic activity" (slip op. 16; emphasis added). But the Court did not in this passage imply that the entry itself was the taxable event. As the citation in *Colville* to *Buster* v. *Wright*, *supra*, makes clear (see discussion in text), it is the engaging in business on the reservation that subjects the non-Indian to tax. To suggest that a tax must be imposed at the outset as a condition of entry under the lease is but another way of saying that the Tribe may be held to have waived by implication in a contract its sovereign power to tax. This is not the rule. See note, 7, *supra*.

court sustained the application of an Indian tax on non-Indian merchants for the privilege of trading within its borders despite a statute providing that persons, such as the non-Indian merchants, who were in lawful possession of town lots could *not* be removed from the Territory. *Buster* v. *Wright*, *supra*, 135 F. at 950, 957-958;[10] see note 3, *supra*.

The 1879 report of the Senate Judiciary Committee, discussed above, although it observed that the Chickasaw permit tax there in issue had as one object "to prevent the intrusion of unauthorized persons," also noted a second object—"to raise revenue." S. Rep. No. 698, *supra*, at 1, quoted in *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 389. And the report's discussion of the power to raise revenue to support essential governmental services (see pages 10-11, *supra*) was not in any manner limited to situations in which the tax was imposed as a condition to the non-Indian's initial entry on the reservation. Finally, the view of the Executive Branch, reflected early in the enforcement action under review in *Buster* v. *Wright*, *supra*, has been that the power to tax is not so conditioned. See also F. Cohen, *supra*, at 143 ("The power to tax does not depend on the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction").

Thus, there is no basis for petitioners' argument that by acquiring a lease to extract oil and gas from reservation lands they also implicitly purchased an indefinite exemption from governing ordinances, including revenue measures. To the contrary, such leases are made "under the assumption that the purchasers will comply with the local laws." *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392,

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[10] "The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, * * *." 135 F. at 958.

quoting 23 Op. Att'y Gen. 214, 217 (1900); *Buster* v. *Wright*, *supra*, 135 F. at 952-953.

3. Nor could it be suggested that the Jicarilla Apache Tribe's power to tax is circumscribed because its reservation was established by Executive Order. Because tribal sovereignty—including the power to tax—is a residuum of aboriginal independence, it cannot vary according as the National sovereign has defined the area in which the tribe will reside by one means rather than another. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). The Executive Orders setting apart lands as a "reservation" for the Tribe (80-15 Br. App. 20a-25a) in no way manifest an intent to recognize only a diminished sovereignty in the Tribe, and it may be doubted whether the President could do so, without authorizing legislation. Cf. *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941). In any event, the *Colville* decision, by expressly recognizing the authority of the Colville Tribes to tax activities on their Executive Order reservation (slip op. 6 n.12) as not less than that of the other tribes residing on treaty reservations (*id.* at 6 nn.13 & 14) has foreclosed the argument that taxing authority on Executive Order reservations is of a narrower scope.

These principles apply equally to severance taxes. The Court has recognized that tribes residing on Executive Order reservations have an interest in the use and disposition of their lands and resources that, at least unless Congress otherwise directs, is to be presumed to be the equivalent of that of tribes on reservations established by treaty or statute. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 598 (1963). The very leasing legislation at issue in this case conforms to this view, for it provides for the leasing of Executive Order reservations in the same manner as others, 25 U.S.C. 398a and b, and protects such reservations against abolition or diminishment by the President (25 U.S.C. 398d). Section 16 of the Indian Reorganization Act likewise does

not distinguish between Executive Order and treaty reservations in providing for the exercise of tribal powers, including the right to tax, or in conferring on the tribe the power to prevent the leasing of its land. 25 U.S.C. 476.[11]

II. THE TRIBE HAS NOT BEEN DIVESTED OF ITS INHERENT POWER TO IMPOSE SEVERANCE TAXES

Petitioners contend (80-11 Br. 22-41; 80-15 Br. 15-29) that even if, after accepting a "dependent status," the Tribe retained for a time the sovereign prerogative to impose the severance tax, that authority has been taken away by subsequent congressional action. But petitioners cannot cite a *single reference* to Indian severance taxes in the materials upon which they rely, much less a reference to an intent to abrogate the power to impose such taxes. Under these circumstances, there simply is no basis for concluding that the power to "rais[e] revenues for essential government programs" (*Colville*, *supra*, slip op. 20) has been divested by federal law, whether a specific statute or a more general pattern of legislation that has revealed the tribal tax as "inconsistent with the overriding interests of the National Government" (*id.* at 15-16).

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[11] Petitioners' suggestion (80-11 Br. 22-23; 80-15 Br. 13) that a different rule should apply here because of the nature of the organization of the Jicarilla Apache Tribe at the time of the Treaty of Guadalupe Hidalgo, 9 Stat. 22, is wholly without merit. Recognition of the inherent sovereignty of a particular Indian tribe does not depend on the manner or degree to which that sovereignty was *exercised* at the time the tribe came under the dominant control of the federal government. Cf. *United States* v. *Santa Fe Pacific R.R.*, *supra*, 314 U.S. at 344-346; *Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 206. Assuming, *arguendo*, that the Jicarilla Apache Tribe was in some respects different (and what tribe was not?), Congress could not have intended to freeze the status quo as of 1848, relegating tribes to whatever measures of self-government may have been within their contemplation in that year.

A. The Act of March 3, 1927

Petitioners first argue (80-11 Br. 29-32; 80-15 Br. 16-23) that, in passing the Act of March 3, 1927, to regulate the leasing of minerals on Executive Order reservations, Congress implicitly divested the Tribe of its authority to tax mineral production on the Reservation. They point to nothing in the text or legislative history of the Act remotely suggesting such a result. They simply assert that the ouster of tribal taxing power follows from Congress' decision to permit the states to tax production of minerals on Executive Order reservations. But the obstacles to that proposition—far from self-evident on its face—are overwhelming.

1. It hardly needs saying that conceding the power of taxation to one sovereign does not necessarily, or even usually, cancel the pre-existing authority of another government with jurisdiction over the same activity to impose a like tax. One need only remember that most of us pay federal and state—and sometimes also city and foreign—income taxes, subject only to such credits or offsets as each taxing authority chooses to grant. Thus, when Congress lifted the immunity previously enjoyed by lessees of Indian mineral lands, and allowed states to tax their activities, it cannot be presumed that this automatically insulated them from all other tax liability. On the contrary, the usual rule is exemplified by the Hayden-Cartwright Act (ch. 582, 49 Stat. 1521, 4 U.S.C. 104) and Buck Act (ch. 787, 54 Stat. 1059, 4 U.S.C. 105-110), permitting State taxation within other federal enclaves without affecting the power of the United States to impose its own like taxes. See 4 U.S.C. 108. Nor is the result any different in the context of an Indian reservation. The *Colville* case settles that there is no anomaly in the co-existence of state and tribal power to tax the same transaction.

2. Apparently, petitioners rely on the ambiguous status of Indian reservations created by Executive Order—as

distinguished from those established by treaty or Act of Congress. But that argument is equally flawed.

As early as 1919, Congress had included Indian reservations established by Executive Order, together with all others, in a statute authorizing leasing for "solid" minerals, which granted all royalties to the affected tribe. Act of June 30, 1919, ch. 4, 41 Stat. 31, 25 U.S.C. 399. And, well before the 1927 Act, both Attorney General Stone and Interior Solicitor Edwards had suggested that the tribes occupying Executive Order reservations were equally entitled to enjoy the revenues from oil and gas exploitation of the lands set aside for them and that the Mineral Lands Leasing Act of 1920 was accordingly inapplicable. 34 Op. Att'y Gen. 181 (1924); Op. Solic. Int. Dep't A-2592 (1924), in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indians Affairs 1917-1974*, at 101. Without any contrary indication, we are surely entitled to assume that this view prevailed in Congress and that the 1927 Indian Leasing Act was framed on this premise. Indeed, on its face, one of the major purposes of the legislation appears to have been to lay to rest any doubt on that score. Henceforth, the President was forbidden to disestablish or reduce Indian reservations created by Executive Order. 25 U.S.C. 398d. Mineral leases could be issued, in the future, only "with the consent of the [tribal] council." 25 U.S.C. 398. And all royalties were to inure to the benefit of the tribe. 25 U.S.C. 398b.

The effect of the 1927 Act was to complete the process of placing Executive Order Indian reservations—at least so far as mineral resources were concerned—on an equal footing with those established by treaty or Act of Congress. The provision permitting state severance taxes is no exception. The same rule had been enacted three years earlier, in almost identical terms, for other Indian reservations. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398. Given this general pattern, it would seem very strange to find in the 1927 legislation a congres-

sional purpose to abrogate—uniquely in the case of tribes whose territory was defined by Executive Order—the pre-existing power of taxation.

3. In sum, conceding state power to tax mineral lessees on Executive Order reservations is, of itself, no more evidence that Congress meant to deny the affected tribes their own power of taxation than is the like congressional decision of 1924 with respect to treaty reservations. No one suggests that the 1924 Act had any such effect. Nor could such an argument be advanced.

Indeed, it is obvious that the royalty and taxing provision of the Act of May 29, 1924—copied for other Indian reservations in 1927—simply carried forward earlier provisions. We have already noticed the statute enacted June 30, 1919, governing leasing of "solid" minerals on Indian reservations generally and authorizing state severance taxes.[12] Other precedents are special provisions for oil and gas leases affecting the Osage and Quapaw Reservations, both created by Executive Order. Act of March 3, 1921, ch. 119, Section 26, 41 Stat. 1248; Act of March 3, 1921, ch. 120, Section 5, 41 Stat. 1250.[13] But perhaps the most important model is the Mineral Lands Leasing Act of February 25, 1920 (ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*), providing generally for leasing of minerals (including oil and gas) on public lands of the United States. That statute expressly preserves state taxing power on the "output of mines" (Section 32, 30 U.S.C. 189),[14] and, besides, grants the affected state a

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[12] A proviso to Section 26 of the 1919 Act, 41 Stat. 33, stipulated:

> That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they may have, to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

[13] In both these statutes, the State of Oklahoma is expressly authorized to impose a tax on "the production" of minerals from Indian lands.

[14] Although the language of Section 32—like the 1919 Indian Leasing Act—speaks of "any rights [the States] may have" to

share of the royalty revenues. Section 35, 30 U.S.C. 191.[15] Yet, it is plain the United States did not thereby surrender its prerogative to impose its own like taxes. There is no reason to draw a different inference in the case of Indian minerals.

The most natural explanation for the consent-to-tax provisions in the several statutes—whether involving public domain lands, Indian reservations, or other federal enclaves—is a Congressional concern to afford the states a fair share of revenues from activities within their borders while, at the same time, ending the "tax favoritism" then enjoyed under the "federal instrumentality" doctrine by lessees of the government or its Indian wards. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 610 (1943).[16]

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impose severance taxes, this Court long ago construed the provision as an effective grant and waiver of federal immunity. *Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45 (1925).

[15] The State share, originally fixed at 32½%, was increased to 50% in 1976. See Pub. L. No. 94-579, Section 317(a), 90 Stat. 2770. The provision for the state to receive revenues through both royalties and severance taxes also establishes that it is no departure from the pattern of leasing legislation for the Jicarilla Apache Tribe to do the same.

[16] Congress believed that it was required affirmatively to consent to state taxation because of a series of decisions of this Court holding that minerals taken from Indian lands are exempt from taxation unless Congress provides otherwise. See H.R. Rep. No. 763, 69th Cong., 1st Sess. 5 (1926), citing *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916); *Howard* v. *Gypsy Oil Co.*, 247 U.S. 503 (1918); *Largo Oil Co.* v. *Howard*, 248 U.S. 549 (1919); see also S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926). These cases were based on the federal instrumentality doctrine, which was still in force at the time and was not expressly overruled until the Court's decision in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365 (1949).

Despite the demise of the instrumentality doctrine and its formalistic approach to exemption of reservation activities from state taxation, there is a serious question whether, absent congressional consent, the state could tax an activity so pervasively regulated and

It remains only to examine the legislative history of the 1927 Act to determine whether there is to be found there what does not emerge from the text or the general pattern of like legislation. Not surprisingly, nothing of the kind appears. There is not the slightest indication of any congressional intent to abrogate tribal taxing authority.

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so important to tribal interests as the mineral leasing of tribal lands. See *White Mountain Apache Tribe* v. *Bracker, supra; Central Machinery Co.* v. *Arizona Tax Comm'n, supra.* Compare *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra,* slip op. 20.

This issue of the state's power to tax under general principles of immunity in Indian law would be relevant in the present case only if it were found that Congress repealed the express authorization in the 1927 Act for states to tax the output of leases on Indian lands when it enacted Indian leasing legislation in 1938 (ch. 198, 52 Stat. 347, 25 U.S.C. 396a-g). The 1938 Act was intended to provide a comprehensive and uniform system for the mineral leasing of tribal lands, to bring mineral leasing into harmony with the Indian Reorganization Act, and to rectify the failure of then-existing law to give the Indians the greatest return from the leasing. S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938).

It was argued below that the 1938 Act, which repealed all inconsistent legislation (Section 7, 52 Stat 348) and contained no authorization of state taxation, effectively repealed the 1927 Act, thereby rendering New Mexico's taxes invalid. See also F. Cohen, *supra,* at 87 (1938 Act "superseded" earlier legislation); American Indian Policy Comm'n, *Final Report,* Vol. 1, at 140, 240-242 (1976) ("express, rather than implied, repeal" of 25 U.S.C. 398c "should be achieved"). The Solicitor has held that *tribal* rents and royalties received under leases issued pursuant to the 1938 Act are not subject to state taxation (84 Interior Dec. 905 (1977)); 86 Interior Dec. 181 (1979) (Jicarilla Apache tribal lands).

Because the court of appeals concluded that the 1927 Act was not, in any event, intended to divest the Indians of the power to impose a severance tax and that the tribal tax did not constitute a multiple burden on interstate commerce, that court found it unnecessary to decide whether New Mexico's taxes also are lawful (J.A. 156, 158 n.5). The question is not presented to this Court, and we assume, for purposes of this brief, that the states' power to tax under the 1927 Act remains effective.

4. The impetus for the 1927 statute was an apparent lacuna in the law. Since 1891, there had been general authority to lease Indian lands, but only where they were "occupied by Indians who have bought and paid for the same." Act of February 28, 1891, ch. 383, 26 Stat. 795, 25 U.S.C. 397. That qualification was thought to exclude Indian reservations created by Executive Order. See *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159, 161-162, 164 (1936). The same limitation applied to the amending Act of May 29, 1924, *supra*, which permitted longer-term leases. As we have noticed, a statute enacted in 1919 embraced all Indian lands in certain states, but did not authorize oil and gas leases. Act of June 30, 1919, *supra*. That left only the Mineral Lands Leasing Act of February 25, 1920, *supra*, as potentially applicable to Executive Order reservations. Yet, that statute, governing lands and minerals "owned by the United States," divided all benefits between the federal and state governments, leaving nothing for the Indians. See Section 35, 30 U.S.C. 191. To say the least, that result raised a serious question whether the 1920 Act embraced Indian lands.

For a short period, the void was filled by administrative action. On June 9, 1922, Secretary of the Interior Fall held that lands within Executive Order reservations could not be leased under the authority of the 1891 Act as lands "bought and paid for" by the Indians but that they were subject to leasing under the Mineral Lands Leasing Act as "lands of the United States." 49 Interior Dec. 139 (1922). That ruling provoked several hundred applications under the 1920 Act to prospect for oil and gas on Executive Order reservations, particularly portions of the Navajo Reservation in New Mexico and Utah, and a number of permits were granted.[17] Within a year, how-

[17] Members of Congress repeatedly compared the decision to lease Executive Order reservations under the 1920 Act to the "Teapot Dome" scandal involving the leasing of federal oil lands within the naval reserves, for which Secretary Fall had been indicted. 67

ever, Secretary Fall's successor as head of the Interior Department recommended special legislation to provide that the proceeds from the leasing of Executive Order reservations pursuant to the Mineral Lands Leasing Act of 1920 be deposited to the credit of the tribes. 65 Cong. Rec. 149 (1923); S. Rep. No. 669, 68th Cong., 1st Sess. 1-2 (1924).[18] Under this proposal, the lessees presumably would have been subject to state taxation by virtue of Section 32 of the 1920 Act. Shortly thereafter, Attorney General Stone rendered an opinion that the Mineral Lands Leasing Act did not apply to Executive Order Indian reservations. 34 Op. Att'y Gen. 181 (1924).[19]

The Department of the Interior urged enactment of its bill as consistent with numerous other instances in which Congress had recognized the right of Indians living on Executive Order reservations to the proceeds of mineral leasing, timber cutting, and sale of surplus lands. S. Rep. No. 669, *supra*, at 2. The Senate acquiesced. 66 Cong. Rec. 998-999 (1924). In the House, the Com-

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Cong. Rec. 6113, 6116 (remarks of Rep. Frear), 11381 (remarks of Rep. Sproul), 11395 (remarks of Rep. Schafer), 11396 (remarks of Rep. Hayden) (1926).

[18] Senator Harreld, in discussing the bill, stated: "Secretary Fall has made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases." 66 Cong. Rec. 998 (1924).

[19] The processing of applications was then suspended, and the United States sued to cancel the permits granted by Secretary Fall. See H.R. Rep. No. 763, 69th Cong., 1st Sess. 5-6 (1926). The district court declined to cancel the permits, and on appeal, the United States Court of Appeals for the Eighth Circuit simply certified to this Court certain questions presented. *United States* v. *Harrison*, Equity No. 8288 (D. Utah 1925). The decision of the district court and the questions certified by the Eighth Circuit are reproduced in H.R. Rep. No. 763, *supra*, at 6-7. As Congress anticipated, *id.* at 8, the case was dismissed by stipulation following passage of the 1927 Act. *United States* v. *McMahon* [*Harrison*], 273 U.S. 782 (1927).

mittee on Indian Affairs agreed with the payment of bonuses and royalties for the benefit of the tribes, but recommended an amendment which would have authorized the states to levy taxes on production of minerals on Indian lands "in all respects the same as minerals produced on privately ownd lands," with the Secretary to pay all such taxes out of tribal funds. H.R. Rep. No. 1254, 68th Cong., 2d Sess. 1 (1925). The bill passed the House in this form, 66 Cong. Rec. 2233-2234 (1925). After the Senate initially concurred in the House amendments, the bill was recalled and further amended by the Senate, 66 Cong. Rec. 2499, 2799 (1925). The Senate amendment deleted the authorization of state taxation on mineral production on Indian lands and proposed instead to give the states 37½% of the royalties, with 62½% going to the benefit of the tribes. 66 Cong. Rec. 2799 (1924). The provision for 37½% of the royalties to be paid to the states was identical to that contained in Section 35 of the Mineral Lands Leasing Act, pursuant to which Executive Order reservation lands were to be leased under the bill. The conference committee adopted the Senate approach, H.R. Rep. No. 1637, 68th Cong., 2d Sess. (1925), but the bill failed of passage on a point of order.[20]

In its next session, the Secretary suggested that Congress pursue another approach:

> Instead of enacting legislation which would authorize the leasing of unallotted land on Executive order Indian reservations subject to the general leasing act, I believe that authority should be granted for leasing such land under terms and conditions similar to those governing the leasing of unallotted

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[20] The point of order was sustained in the House on the basis that the conferees had acted on a matter not in disagreement between the two Houses and the House had not acted on the subsequent Senate amendment. 66 Cong. Rec. 5433-5434 (1924). Last minute opposition to the bill in the House apparently was motivated by the concerns of pro-Indian legislators that any division of the royalties implied that the United States, and not the Indians, held equitable title to the land. See Note, *Tribal Property Interests in Executive-Order Reservations*, 69 Yale L.J. 627, 632-633 & nn. 30, 34, 35 (1960).

land on Indian reservations created by treaty as provided in the act of May 29, 1924 (43 Stat. 244).

S. Rep. No. 768, 69th Cong., 1st Sess. 2 (1926). Leasing under the 1924 Act was also thought to have the further advantage of yielding higher royalties of at least 12½%, as compared to 5% under the 1920 Act. *Id.* at 8. From this point, the 1924 Act—which, without controversy, had permitted State severances taxes—became the model.[21]

Still, the Secretary's proposal was similar to the bill that failed of passage in the previous Congress in that it provided for the states to receive 37½% of the royalties "in lieu of taxes" and for the tribes to receive 62½%. But the new proposal called for the states to expend their share for public roads and schools *for the benefit of the Indians.* Moreover, the Secretary made clear that the states' share of the royalties was to serve as a substitute *only* for state taxation of the lessor tribe's royalty interest; the lessees were to be subject to state taxes. S. Rep. No. 768, *supra*, at 2-4; H.R. Rep. No. 763, 69th Cong., 1st Sess. 2-3 (1926).[22]

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[21] The 1924 legislation followed the Secretary's recommendation "that legislation should be enacted whereby oil and gas leases of such lands may be continued [beyond 10 years] for so long as there is production in paying quantities." H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924); S. Rep. No. 546, 68th Cong., 1st Sess. 2 (1924); S. Rep. No. 344, 68th Cong., 1st Sess. 2 (1924). In the course of adopting legislation to serve that purpose, Congress added, expressly without objection from the Secretary, a provision authorizing the states to tax the oil and gas production of the lessees as well as the royalties received by the Indians. *Ibid.* This provision of the 1924 Act simply extended to all treaty reservations a policy adopted with respect to the Quapaw and Osage Tribes in 1921. See page 21, *supra*; 66 Cong. Rec. 6844 (1924) (remarks of Senators Hastings and Snyder); *Leasing of Executive Order Reservations: Hearings on H.R. 9133 Before a Subcomm. of the House Comm. on Indian Affairs*, 69th Cong., 1st Sess. 10-11, 50-51 (1926) (remarks of Rep. Hayden); *Oklahoma Tax Comm'n* v. *Texas Co., supra*, 336 U.S. at 366-367.

[22] Subjecting lessees' interests to state taxation would seem to have followed from bringing Executive Order reservations under the 1924 Act, which provided for such taxation.

Committees of both Houses agreed to the Secretary's proposal to authorize leasing under the 1924 Act and thus to establish

> a uniform policy for the leasing of all Indian reservation lands for oil and gas mining purposes, under the supervision of the Bureau of Indian Affairs. [The bill] simply applies existing law relating to treaty reservations to Executive-order reservations.

S. Rep. No. 768, *supra*, at 5; see also H.R. Rep. No. 763, *supra*, at 3-4. Both committees, however, carried this principle of uniformity further than had the Secretary's proposal, and eliminated his proposal that the states receive a share of the royalties:

> The bill as introduced provided for a division of the proceeds received from rentals, royalties or bonuses so that 62½ per cent would be credited to the Indians and 37½ per cent paid to the State where the leased lands are located. Payments to the State, however, were to be conditional upon the expenditure of the money so obtained upon roads within or contributory to the respective reservations or for the support of schools attended by Indian children. The practical effect of this limitation was to require the expenditure of all of the income from oil and gas leases either directly or indirectly for the benefit of the Indians.
>
> To pay money to a State and then require the State to expend it for Indian purposes seems to be unnecessary and of no advantage to the State. Your committee recommends that the bill be amended by providing that the entire proceeds from oil and gas leases be deposited in the Treasury, where the same shall be subject to appropriation by Congress for the use and benefit of the Indians.

H.R. Rep. No. 763, *supra*, at 4; see S. Rep. No. 768, *supra*, at 6.[23] Giving the Indians the entire proceeds from such leasing was thought to be a continuation of

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[23] Doubt had also been expressed that the states would indeed apply the 37½% share for the Indians' benefit. 67 Cong. Rec. 6113, 6115 (1926) (remarks of Rep. Frear).

longstanding congressional policy respecting Executive Order reservations.[24]

At the same time, the committees also eliminated the exemption of the Indians' royalties from state taxation by permitting the state to levy taxes on the entire production within its borders the same as upon unrestricted lands and treaty reservation lands under the 1924 Act. S. Rep. No. 768, *supra*, at 6. Thus, as under the 1924 Act, both committees recommended tax provisions in which a distinction was made

> between the State taxes which may be levied upon the property of lessees and upon the share obtained for the Indians by providing that State or local taxes may only be levied upon the rentals, royalties or bonuses received by the Indians. The effect of this section is to permit the State to collect directly from the oil producer on Indian lands any and every kind of tax that may be assessed against others engaged in like operations elsewhere in the State. The State is not authorized, however, to collect such taxes directly from the Indians but the same are to be paid for them by the Secretary of the Interior and a proviso is added which exempts the lands or other property of the Indians from any tax lien. The final result of this legislation will be that the entire output of oil and gas will be taxed by the States, the producer paying upon his share and the Indians upon the share obtained for them.

H.R. Rep. No. 763, *supra*, at 5; see S. Rep. No. 768, *supra*, at 1. The bill also contained a provision requiring an Act of Congress for any change in the boundaries of existing Executive Order reservations.[25]

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[24] S. Rep. No. 768, *supra*, at 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 4 (1927); H.R. Rep. No. 1791, 69th Cong., 2d Sess. 3-4 (1927).

[25] In hearings subsequent to the veto of the bill, the Commissioner of Indian Affairs stressed that this provision was

> of the very greatest importance because, during the agitation over the other bill the impression went out to the Indians that

The bill passed both Houses containing the provisions described above, but was vetoed by President Coolidge because he objected to its differential treatment of permittees and applicants under the 1920 Act while their respective rights were before this Court. S. Doc. No. 156, 69th Cong., 1st Sess. 1-2 (1926); see note 19, *supra*.

In the next session of Congress, legislation identical to the vetoed bill in all respects relevant to this case, but seeking to satisfy the objection of the President as to the treatment of permittees and applicants under the 1920 Act, was introduced. See S. Rep. No. 1240, 69th Cong., 2d Sess. (1927), and H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927), both of which echo the views expressed in the 1926 committee reports. The new measure was passed, and finally signed into law. 68 Cong. Rec. 5529 (1927).

5. As is evident from the foregoing, there simply was no controversy surrounding the question whether the states should be able to tax mineral production under leases on Executive Order reservations. The only issue relevant for present purposes was whether the states should be permitted to tax the tribe's royalty interest or, in lieu of such taxes, to receive 37½% of the royalties. Congress' decision to allow the states to tax the Indian's royalty interest in no way suggests that the state's distinct power to tax the lessee was intended to preclude tribal taxation of the lessee. As petitioners acknowledge, there was no discussion whatever of tribal taxing authority in connection with passage of 1927 Act.[26] Accordingly, there is no basis for petitioners' suggestion (80-15

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the President might take by Executive order lands away from the Indians, or could do so if he wished; and so section 4 in this bill takes from the President power to change boundaries of Executive order Indian reservations or make any disposition of the lands therein; it would require an act of Congress.

Leasing of Executive Order Reservations: Hearings on H.R. 15021 Before the House Comm. on Indian Affairs, 69th Cong., 2d Sess. 43 (1927).

[26] As we have explained in Point I, the authority of Indian tribes to tax non-Indians doing business on their reservations was well settled prior to 1927.

Br. 20) that the 1927 Act was a "carefully crafted compromise" dividing up the revenues from leasing on Executive Order reservations in some precise fashion, such that a recognition of tribal taxing authority would upset a balance struck by Congress.

Moreover, tax rates may be changed periodically[27] and may vary from state to state (and even from locality to locality within the state[28]), and royalty and other terms of the lease might vary depending on market conditions and other factors at the time the lease was entered into.[29] Thus, because the 1927 Act fixed neither the amount of the royalty or other consideration that tribes may receive nor the amount of state taxes, if any, that may be imposed, Congress cannot be thought to have had in mind *any* particular division of revenues between the states and tribes. The Jicarilla Apache Tribe's receipt of revenues from its severance tax therefore is in no way inconsistent with a supposed balance struck in the 1927 Act.

In sum, the legislative history of the 1927 Act confirms what appears from the text. Far from abrogating the

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[27] As petitioners point out (80-15 Br. 24 n.30), the State of New Mexico has frequently adjusted its severance tax rate in recent years to respond to changing conditions. Petitioners, however, would deny the governing body of an Indian tribe the same opportunity to respond to changing economic and fiscal conditions by exercising its sovereign prerogative to impose additional taxes. Petitioners would prefer that the total revenues of Indian tribes from all aspects of reservation leasing operations, unlike the revenues of states from the same operations, be frozen for all time at whatever royalty rate may have been fixed at an earlier date under different circumstances. We fail to see either the logic or fairness of treating the governing bodies of the State and the Tribe differently in this regard.

[28] Section 3 of the 1927 Act, 25 U.S.C. 398c, permits taxes to be levied "by the State or local authority."

[29] The 1927 Act itself did not establish a particular royalty rate—although there generally was a minimum royalty of 12½%. See page 27, *supra*; 25 C.F.R. 171.13(a) (1980). Section 2 of the 1938 Act, 25 U.S.C. 396b, now provides that leases are to be offered for sale to the highest bidder for a bonus consideration, in addition to stipulated rentals and royalties. See 25 C.F.R. 171.3(a) (1980).

taxing power of Executive Order reservation tribes, Congress now confirmed their status as equal to that of tribes who held their lands pursuant to treaty. There is simply no basis for construing the 1927 Act—any more than its 1924 model—as impliedly divesting Indian tribes of their sovereign authority to tax activities within their reservation. In our submission, the matter is not open to doubt. But, even if one properly could characterize the 1927 Act as ambiguous in this respect, the issue must be resolved by construing the statute "generously in order to comport with * * * traditional notions of sovereignty and with federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, *supra*, slip op. 7.

B. Other Federal Legislation and Regulation

Petitioners urge (80-11 Br. 33-35; 80-15 Br. 24-29) that the Tribe is divested of any power to tax oil and gas production because of federal law and regulation specifically governing the leasing of its lands and general federal policies concerning the production, pricing, and distribution of energy resources. This argument is wholly without merit.

1. In the first place, petitioners advance no reason to suppose that if Congress is content to allow the *states* to levy such taxes (apparently without limitation) on oil and gas produced both on and off Indian reservations,[30] the imposition of severance taxes by Indian tribes is inimical to federal interests. And, as it develops (see page 34, *infra*), Congress has very recently indicated its willingness both to accept tribal severance taxes and to incorporate them into the operation of federal energy pricing legislation in the same fashion as those imposed by the states.

Moreover, although petitioners cite a wide range of federal statutes and regulations with which tribal taxes

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[30] See note 16, *supra*. The power of the states to tax off-reservation production, absent federal preemption, cannot be doubted.

are said to be in general conflict, they point to *no* specific point of direct conflict.[31] Instead, it is urged that under *Central Machinery Co.* v. *Arizona State Tax Comm'n* and *White Mountain Apache Tribe* v. *Bracker*, *supra*, the very *existence* of the 1938 Act, 25 U.S.C. 396a-g, under which these leases were issued, together with the Secretary's regulation of leasing and production, 25 C.F.R. Part 171 and 30 C.F.R. Part 221, preempts the field. The suggestion is novel.

Preemption was found in *White Mountain* and *Central Machinery* to prevent *state* law from frustrating or disrupting federal statutes and regulations intended to protect the Indians in their dealings with non-Indians and to encourage tribal self-government and economic self-sufficiency. See *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690-691 (1965); *White Mountain*, *supra*, slip op. 11-13, 15-16; *Central Machinery*, *supra*, slip op. 3-4; *Colville*, *supra*, slip op. 18. It would be a perversion of those rules to preclude tribal laws in such an area, even where these laws were complementary and entirely consistent with the federal protection afforded the tribes. Where, as here, the Tribe's severance tax has been approved by the Secretary, the very officer responsible for the promulgation and implementation of the regulations by which petitioners assert the tribal ordinance is preempted, the argument must surely fail. Indeed, as the court of appeals noted (J.A. 160 & nn.6, 7), the 1938 Act itself, 25 U.S.C. 396b, permits tribes organized under the Indian Reorganization Act "to assume and define for themselves the leasing process" in accordance with the provisions of any constitution or corporate charter adopted pursuant to the IRA.[32]

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[31] Petitioners' argument that the tribal tax is inconsistent with Interior regulations prohibiting changes in the terms of a lease without the parties' consent is discussed in note 7, *supra*.

[32] The Secretary implemented this provision in a regulation promulgated in 1938 (3 Fed. Reg. 849) which is still in effect:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pur-

2. Finally, we turn to petitioners' argument that this tribal severance tax is generally inconsistent with the existence of federal regulation of energy production, pricing, and distribution. Because no points of particular conflict are set forth, it should suffice to show that recent federal legislation indicates Congress' view that tribal taxation is inherently no more inconsistent with federal gas pricing policy than is state or local taxation. Section 110(a) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3368, 15 U.S.C. (Supp. III) 3320 (a), provides that the maximum price of gas on its first sale may be exceeded by the amount necessary to recover state severance taxes. "State severance tax" is defined explicitly to include taxes imposed by an "Indian tribe," Section 110(c)(1), 15 U.S.C. (Supp. III) 3320(c)(1), "recognized as eligible for services provided by the Secretary * * *." Section 106(b)(2)(B)(ii), 15 U.S.C. (Supp. III) 3316(b)(2)(B)(ii).

In so providing, Congress acted with full awareness of the cases now before this Court:

> While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the right of Indian tribes to impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes.

S. Rep. No. 95-409, 95th Cong., 2d Sess. 91 (1978). To be sure, Congress' enactment of this provision does not

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suant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), * * * or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. 171.29 (1980).

confirm the Tribe's inherent power to impose severance taxes on petitioners. But, in our view, it forecloses the argument that the Tribe is divested of such a power by any overriding interest to be found in federal energy policy.[33]

Prompted in part by the Montana severance tax on coal, which is before this Court in *Commonwealth Edison* v. *Montana*, No. 80-851, probable jurisdiction noted (Dec. 8, 1980), Congress has considered several bills which would limit the rate of state coal severance taxes (S. 2695, H.R. 5294, H.R. 6625, 96th Cong., 1st & 2d Sess.), and one (S. 1778) which would limit the rate applied to energy resources (including oil, gas, and coal) extracted from federal and Indian lands. Because Congress has recently and explicitly treated tribal severance taxes like those of the states, we may again expect some legislative direction concerning tribal taxes if Congress finds severance taxes to pose an obstacle to fulfillment of national energy policies.

Under these circumstances, we submit that the tribal tax at issue here—one specifically approved by the Secretary—ought not be overturned on any notion of some general conflict with federal energy policy.

III. THE TRIBE'S TAX DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION

A. The Inapplicability of the Commerce Clause

Petitioners finally argue (80-11 Br. 41-46; 80-15 Br. 29-43) that, even if the Tribe retains the power to impose a severance tax, the particular ordinance in suit violates the Commerce Clause of the Constitution because it taxes an activity which is an integral part of the flow of commerce and discriminates against and imposes a multiple burden on interstate commerce. The most funda-

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[33] See Section 102(b)(3) and (6) of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. (Supp. III) 3289; see also, Remarks on Signing National Energy Bills, 14 Weekly Comp. of Pres. Doc. 1979 (1978).

mental of the several defects in this argument is petitioners' assumption that the Commerce Clause, of its own force, limits an Indian tribe in its dealings with non-Indians.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. "[I]t long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation * * * affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'" *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454 (1979), quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). Thus, the Commerce Clause itself places limitations upon state legislation that discriminates against or places undue burdens upon commerce "among the several States" (*Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-378 (1976)), "with foreign Nations" (*Japan Line, Ltd.* v. *County of Los Angeles, supra*), or "with the Indian tribes" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra*, slip op. 20). But these decisions restraining the powers of the *states* have no application in the present case. "As separate sovereigns pre-existing the Constitution, [Indian] tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); see also *United States* v. *Wheeler, supra*, 435 U.S. at 328-329; *Oliphant* v. *Suquamish Indian Tribe, supra*, 435 U.S. at 194 n.3; *Talton* v. *Mayes*, 163 U.S. 376 (1896).

This conclusion is compelled by the structure and purposes of the Commerce Clause. The Framers' separate

expression in the Commerce Clause of Congress' power to regulate Indian commerce establishes that Indian tribes are not to be regarded as "States" for purposes of the Clause, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831),[34] and that their actions therefore are not subject to principles governing commerce "among the several States." The Commerce Clause speaks of Congress' power to regulate commerce "*with* the Indian tribes," just as it authorizes Congress to regulate commerce "*with* Foreign Nations" (emphasis added). The identical language confirms that the Framers intended the two phrases to be parallel and contemplated in each the establishment, through the national government, of a bilateral relationship between this Nation and a distinct sovereign entity.[35]

We must remember that those who adopted the Indian Commerce Clause spoke of Indian "Nations" with whom it was appropriate to negotiate treaties. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1831); cf. *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) at 17 ("domestic dependent nations").[36] And the origins of the Indian

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[34] "In this clause [Indian tribes] are as clearly contradistinguishable by a name appropriate to themselves, from foreign nations, *as from the several states composing the union.* They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, *the convention considered them as entirely distinct.*" 30 U.S. (5 Pet.) at 18 (emphasis added).

[35] The separateness of Indians, even those residing within the borders of the states, was emphasized in their exclusion from the population base used to apportion Representatives. Art. 1, § 2, cl. 3; see also Amend. XIV, § 2.

[36] The Court stated in *Worcester* v. *Georgia*, 30 U.S. (5 Pet.) at 18:

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those

Commerce Clause indicate that it was intended to give the national government exclusive authority over Indian tribes so that the Nation might speak with a single voice,[37] just as it must in its foreign relations. *Japan Line, Ltd.* v. *County of Los Angeles, supra,* 441 U.S. at 448-450. Surely, it could not be asserted that a foreign nation would violate the United States Constitution by adopting measures that discriminate against or unduly burden commerce with the United States, however unsatisfactory those measures may be to this Nation. Because the Indian Commerce Clause similarly speaks to intercourse with a sovereign entity, that government—the Indian nation or tribe—cannot be held to have violated the Constitution by adopting measures which might cut-off, discriminate against, or burden commerce with non-Indians.

If a tribe's legislation were deemed inimical to the national welfare, the remedies contemplated by the Framers no doubt were the negotiation or renegotiation of treaties, the enactment of legislation governing trade

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powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

[37] Article IX of the Articles of Confederation granted Congress "the sole and exclusive right and power * * * of regulating the trade and managing all affairs with the Indians," but exempted Indians who were "members of any the States" and preserved "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, this ambiguous and divided authority was an "endeavor to accomplish impossibilities." Adoption of the Indian Commerce Clause was intended to eliminate this problem by vesting Congress with exclusive authority over intercourse with Indians, whether within the states or elsewhere. *Ibid.; Cherokee Nation* v. *Georgia, supra,* 30 U.S. (5 Pet.) at 18-19; *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) at 558-559; *United States* v. *Forty-Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876); 2 M. Farrand, *The Records of the Federal Convention of 1787,* 321, 324 (1966); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 Minn. L. Rev. 432, 467-468 (1941).

and other relations,[38] or the exertion of superior force[39] —the same remedies available in our relations with foreign nations. Because the terms and duration of the recognition of Indian tribes as separate sovereigns, like the recognition of foreign nations, present questions of an essentially political nature beyond the jurisdiction of courts (see *Baker* v. *Carr*, 369 U.S. 186, 212, 215-216 (1962); compare *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913), with *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v. *Pink*, 315 U.S. 203, 228-230 (1942); *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *id.* at 1007 (Brennan, J., dissenting)), the Framers could not have intended the courts, through the Commerce Clause, to impose their own views of the proper relationship between Indians and non-Indians and to strike down measures adopted by a tribe with which the political departments of government had not seen fit to disagree. Thus, although in the absence of congressional action, a court must under the Commerce Clause be the "final arbiter of the competing demands of state and national interests" (*Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, *supra*, 325 U.S. at 369) where restrictive legislation adopted by one state may impair commerce "among the several states," and although the Commerce Clause may similarly prevent state legislation from encroaching upon the exclusive federal domain of regulating the Nation's intercourse with foreign nations and Indian tribes, it has never been suggested that, absent legislation, the Commerce Clause permits a court to be the "final arbiter" between competing economic demands

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[38] The Trade and Intercourse Acts are early examples of legislation in this area. See Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263.

[39] Cf. *United States* v. *Santa Fe Pacific R.R.*, *supra*, 314 U.S. at 347; *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

of Indian tribes or foreign nations and the persons in this country with whom they deal.[40]

B. No Commerce Clause Violation

Petitioners' challenge to the Jicarilla severance tax fares no better even if, contrary to our submission above, the Commerce Clause of its own force places some limitations on Indian tribes' regulation of commercial intercourse with non-Indians.

1. Petitioners rely on cases arising under that portion of the clause governing commerce "among the several States," which have held that a *state's* tax affecting inter-

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[40] This is not to say, of course, that all federal legislation relating to Indian affairs is unreviewable, particularly where individual rights of Indians and non-Indians are concerned. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977); cf. *Oliphant* v. *Suquamish Indian Tribe, supra.* But questions regarding the competing demands of Indians and non-Indians in commercial dealings between the two are so intimately bound up with the judgment of the political branches about the degree to which tribes should remain separate sovereign entities or be assimilated into and subject to restrictions governing the society-at-large that the Commerce Clause cannot properly serve as a means of judicial review. The Court appears to have recognized this distinction in *Weeks*, noting that although the distribution of assets there involved was reviewable under equal protection principles embodied in the Fifth Amendment, the decision to abrogate a treaty is not. 430 U.S. at 84, citing *Antoine* v. *Washington*, 420 U.S. 194, 201-204 (1975); see also *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903).

In *Muskogee National Telephone Co.* v. *Hall*, 118 F. 382 (8th Cir. 1902), relied upon by petitioners (80-11 Br. 43), Congress had enacted a statute regulating the manner in which franchises for the construction of telephone and telegraph lines could be granted; the grant of an exclusive franchise by the Creek Nation therefore was invalid because it conflicted with the federal statute. 118 F. at 385-386. Although the court also viewed the franchise as a potential obstruction to interstate commerce in telephone and telegraph messages, this discussion was not necessary to the court's decision. Any modern-day obstructions interposed by a tribe to the flow of commerce through its reservation would likewise better be analyzed in light of their possible conflict with congressional policy reflected in applicable statutes and regulations, rather than the bare language of the Commerce Clause.

state commerce is valid only if it " 'is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.' " *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* 445 U.S. at 443, quoting *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977). It is argued that these principles, drawn from the purposes of the Interstate Commerce Clause to create an "national common market" (*Hunt* v. *Washington State Apple Advertising Comm'n, supra,* 432 U.S. at 350) and "an area of free trade among the several States" (*McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944)), should apply equally to commerce with Indian tribes. But if Indian tribes are subject to any restraints imposed by the Commerce Clause, they are not those that apply to *interstate* commerce.

As we have said, tribes are not "States" for purposes of the Clause; the Framers drafted a separate provision to govern commerce with Indian tribes. The Indian Commerce Clause, on its face, distinguishes Indian commerce: plainly, it was not intended to assimilate Indian tribes into a "national common market" in which they would be constitutionally indistinguishable from the states or to establish an "area of free trade" between Indians and non-Indians. To the contrary, the Indian Commerce Clause acknowledged tribes as sovereign entities who could grant or withhold consent to enter into their territories for commercial or other purposes. The Clause shields tribes from undue state and local interference and permits Congress to preempt Indian and non-Indian intercourse with protective, even preferential, regulation. See *Morton* v. *Mancari,* 417 U.S. 535, 552 (1974); *United States* v. *Antelope,* 430 U.S. 641, 645-647, 649 n.11 (1977). From the start, the Indian Commerce Clause was understood to authorize complete and absolute federal regulation of Indian and non-Indian relations of a kind and degree then unthinkable—and even now not entirely familiar—in respect of non-Indian commerce among the states. And

as the early Trade and Intercourse Acts made clear, much of the regulation was to be prohibitive or restrictive, and exclusive, in character—far from facilitating the free flow of commerce. See Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732, 25 U.S.C. 263. The corollary of this authorization for Congress to adopt highly restrictive measures governing intercourse with Indian tribes is that, in the absence of implementing legislation, the Clause allows comparable latitude for tribes and permits them to regulate commerce with non-Indians in a manner far more restrictive than the measures a state could pursue in regulating commerce with its sister states.[41]

Accordingly, even if the Commerce Clause does impose restraints on the actions of tribes that engage in commerce with their non-Indian neighbors, the restraints are far more limited than those placed upon the states in their commercial dealings with one another. Certainly, there is nothing about the Tribe's severance tax that so departs from the pattern of restrictive regulation governing white-Indian intercourse over the last 200 years that it could be said to violate whatever restraints on

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[41] Thus, it presumably remains true that tribes, unlike states, can close their borders to outsiders, see *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 393; *Powers of Indian Tribes*, *supra*, 55 Interior Dec. at 48-50, notwithstanding the constitutional right of interstate travel which may be rooted in the Commerce Clause. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 630 n.8 (1969); *United States* v. *Guest*, 383 U.S. 745, 758-759 (1966); *Edwards* v. *California*, 314 U.S. 160, 172-174, 177 (1941). So, also, we assume that, absent controlling acts of Congress, an Indian reservation government may ban or limit the importation or exportation of goods in circumstances forbidden to the states. See generally *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). Subject only to Interior Department approval, nothing prevents the Tribes themselves from enacting the same restrictive commercial code that federal legislation once imposed for their benefit, and, to some degree, maintains today. See 25 U.S.C. 81, 177, 251-264; *Warren Trading Post* v. *Arizona Tax Comm'n*, *supra*; *Central Machinery Co.* v. *Arizona State Tax Commission*, *supra*.

tribal legislation lay dormant in the Indian Commerce Clause. We need not press the point, however, for even if the tribes have been divested of their authority to restrict their commercial dealings with non-Indians, the Tribe's ordinance does not violate the principles of free trade embodied in the Interstate Commerce Clause.

2. Contrary to petitioners' contention (80-15 Br. 33-37), the tribal ordinance does not discriminate against interstate commerce. The ordinance does not single out for special treatment products destined for sale or consumption beyond New Mexico. Although 80% of the products do leave the state, that is a matter of indifference to the Tribe, whose severance tax applies indiscriminately whether or not the oil and gas are exported out of state. Nor is there any discrimination against oil and gas that are transported off the reservation in favor of that consumed on the reservation. The only exemption from taxation is for oil and gas taken by the Tribe as royalty in kind (Section 4; J.A. 39). That exception, of course, is not a preference for intrastate sales. In effect, the Tribe, being both the owner and the taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other.

Petitioners contend (80-15 Br. 34-35) that this exemption may prove discriminatory because a processor who locates on the reservation would enjoy a competitive advantage by purchasing the oil and gas received by the Tribe as royalty that has not been subject to the severance tax. The argument is premature, because no processor has yet located on the reservation. But in any event, even if the Tribe taxed its own oil and gas in the same manner as that sold to others, it still might choose to sell to on-reservation processors at a lower rate made possible by its increased tax revenue. The tribe would have the prerogative, if it enters the market, to prefer purchasers located within its borders in this fashion. Cf. *Reeves, Inc.* v. *Stack*, No. 79-677 (June 18, 1980).

3. Petitioners also err in contending (80-11 Br. 44-45; 80-15 Br. 39-43) that the Tribe's severance tax is in-

valid because, when added to New Mexico's similar taxes, it results in a multiple burden on commerce.[42] The multiple taxation problem arises where a number of states, each having a nexus to some portion of the interstate movement of goods or some part of a company's interstate operations, all seize upon that basis to tax the entire interstate transaction or all income from interstate operations, including those portions occurring in other states. In that situation, if each of the co-equally sovereign states taxed the entire transaction or income, interstate commerce would bear cumulative burdens not imposed on intrastate commerce. See, *e.g.*, *General Motors Corp.* v. *Washington*, 377 U.S. 436, 439-441 (1964); *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). In those cases, the Court has required an apportionment of the tax burden among the states according to the activities occurring within each. *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 14; *General Motors Corp.* v. *Washington*, *supra*, 377 U.S. at 439-441, 447-449. But no such issue is presented when taxes are apportioned according to the value of services or activities performed within the respective states. *Washington Revenue Dep't* v. *Ass'n of Washing-*

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[42] As this Court has stated, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way' * * *." *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938), quoting *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U.S. 252, 259 (1919). If, as petitioners urge, commerce with Indian tribes is to be governed by principles applicable to interstate commerce, it necessarily follows that petitioners can be required to pay their "just share of [a reservation's] tax burden." Petitioners do not dispute that their activities have a sufficient nexus to the Tribe's reservation to warrant imposition of the tax or that the amount of the tax is "fairly related" to their activities on the reservation within the meaning of the four-part test enunciated in *Complete Auto*, *supra*. It is therefore odd that they should argue for a complete exemption from the Tribe's tax—and therefore from bearing their "fair share" of the reservation's tax burden.

ton Stevedoring Cos., 435 U.S. 734, 746-747 (1978). So here. There can be no question in the instant case that the Tribe's severance tax is apportioned to the activities of petitioners—the severance of oil and gas—that occurs within the borders of its reservation. *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19-20 n.12.

This conclusion is not altered by the fact that, by virtue of the congressional consent given in the 1927 Act (which consent we assume for present purposes is still effective), the State is also empowered to impose a tax on the same activity—a tax which we may assume is also fairly apportioned to petitioners' activities within the state.[43] The Tribe's power to tax cannot depend on the exercise of the state's power to do the same. Cf. *Exxon Corp.* v. *Wisconsin Dept's of Revenue*, *supra*, slip op. 19-20; *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, 445 U.S. at 443-446.[44] The separate taxes imposed here are merely necessary incidents of Congress' continued recognition of tribes as distinct sovereign or governmental bodies existing within the territory of the states and possessing authority to tax that is derived from a source distinct from that of the states. See *Wheeler* v. *United States*, 435 U.S. 313, 319-324 (1978). The tax therefore is no more a prohibited multiple taxation of interstate commerce than would be a comparable tax imposed by the United States on oil and gas extracted from land, such as that involved here, to which it holds title.[45] The effect is merely to impose an incremental cost on engaging in commerce with Indian tribes —a familiar condition in the experience of the Nation,

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[43] Both New Mexico and the Tribe are taxing an event occurring within their respective borders, not reaching beyond to tax aspects of interstate commerce taking place in other states, as in the Court's multiple taxation cases.

[44] Only Congress, not the states, can divest an Indian tribe of its retained governmental authority.

[45] In any event, petitioners' suggestion that the Tribe can impose *no* tax because of New Mexico's concurrent tax results in no "apportionment" at all, much less a "fair" one.

and one which the Indian Commerce Clause contemplates.

Finally, even if the tax imposed by the Tribe could be thought to be inconsistent with established principles under the Interstate Commerce Clause, the courts are to be the "final arbiter[s]" in disputes arising under the Clause only where Congress has not acted. *Japan Line, Ltd.* v. *County of Los Angeles, supra*, 441 U.S. at 454. In the present case, however, Congress has intervened by enacting the Indian Reorganization Act, which authorizes Indian tribes to adopt constitutions providing for the exercise of all tribal powers they then possessed. The Jicarilla Apache Tribe has accepted that invitation, and its constitution expressly empowers the governing council to tax the affairs of non-Indians. The Secretary of the Interior, pursuant to the Reorganization Act, has approved the ordinance imposing the tax in the instant case. In these circumstances, the restraints of the Commerce Clause, standing alone, have no application.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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